SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1966~~ 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ruby Kolod, Willie Israel Alderman and Felix Antonio Alderisio pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 3, 1967.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A hereto, *infra,* p. 1a.

JURISDICTION

The judgments of the Court of Appeals were entered on February 3, 1967. S.R. VIII and IX;[1] Appendix A, *infra*, p. 20a. Rehearing was denied on March 8, 1967. S.R. XI. By order of Mr. Justice White, dated March 22, 1967, the time for filing this petition was extended to May 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where (1) the indictment charges the utterance of threats in interstate telephone conversations, (2) the evidence is uncontradicted that the defendant held those conversations in an office in his business premises, and (3) the FBI, through illegal electronic eavesdropping in that office, overheard everything there spoken

[1] The record herein consists of the following:

(1) The three volumes of the record on appeal to the Tenth Circuit, paginated from 1 to 519, herein cited as "R. —."

(2) The supplementary record of proceedings on appeal and on limited remand, with the exception of the transcript of the hearing on remand, consisting of twelve separately numbered items. This supplementary record will be cited herein as "S.R.," the particular item being designated by roman numbers and the page reference by arabic numbers, e.g., "S.R.VII, 5."

(3) The five volumes of the transcript of the hearing on remand, transmitted by the Clerk of the Tenth Circuit to the Clerk of this Court by letter of March 30, 1967. This transcript will be cited as "T.", with the volume designated by roman numbers and the page reference by arabic numbers, e.g., "T.IV, 23."

(4) Sealed material transmitted by the Clerk of the Tenth Circuit to the Clerk of this Court by letter of March 30, 1967. The said material has never been seen by the petitioners or any of their counsel and will not be cited herein.

during the time in question, but heard nothing pointing to defendant's guilt:

(a) Whether the defendant is entitled to surrender of the records of the eavesdropping.

(b) Whether the defendant is entitled to inspect the said records.

(c) Whether the defendant is entitled to adduce the said records and the testimony of the eavesdropping agents as evidence that he did not utter threats.

(d) Whether, by an *ex parte* judicial finding based on its *in camera* examination of FBI records, the trial court may constitutionally decide that the defendant's sworn testimony that he had telephoned from the eavesdropped room was false, thereby depriving the jury of the function of determining credibility.

(e) Whether such a judicial finding may constitutionally be based on secret evidence withheld from the defense.

2. Whether, in a case where the government has admitted illegal FBI eavesdropping in premises belonging to one of the defendants and defense counsel has represented in open court the existence of newly discovered evidence of additional illegal eavesdropping in premises belonging to another of the defendants, the government is obligated either to deny the alleged additional eavesdropping or, if not denying it, to disclose its details to the defense.

3. Whether, in a prosecution for conspiracy to transmit threats in interstate commerce in violation of 18 U.S.C. § 875(c), part of the recent body of statutes using the commerce power as a basis for federal juris-

diction over criminal behavior, the accused is entitled to an unambiguous jury instruction that *scienter* of the agreement to use interstate commerce is an essential element of the offense.

4. As to petitioner Alderisio only, whether, when a defendant introduces no evidence in defense, but moves for judgment of acquittal at the conclusion of the prosecution's case, a denial of that motion may be affirmed on the basis of evidence introduced in his co-defendants' case.

STATUTES INVOLVED

Title 18, United States Code, Section 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, United States Code, Section 875(c):

> "Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT

Background Facts

The petitioners were convicted in the United States District Court for the District of Colorado under the first count of an indictment charging them and another person,[2] under 18 U.S.C. § 371, with conspiracy to violate 18 U.S.C. § 875(c) by transmitting in interstate commerce communications containing threats to injure one Robert Sunshine.[3] App. A, *infra*, p. 2a. They were sentenced as follows: Kolod—four years and a fine of $7,500; Alderman—three years and $5,000; and Alderisio—four and one-half years and $7,500. R. 18-20.

The background facts were never in dispute: In June 1959, Kolod invested $78,150 with Sunshine and others in an oil-lease venture, $68,150 of that amount being deposited in escrow with Sunshine pending fulfillment of certain conditions. Alderman then acquired half of Kolod's interest. Sunshine invaded the escrow without fulfillment of the conditions and, by October 1960, had dissipated the entire amount. Kolod and Alderman accused Sunshine of having swindled them and demanded restitution. Their demands continued throughout 1961 and 1962, in many interstate

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[2] The fourth defendant, one de Pietto, was acquitted by the jury. App. A, *infra*, p. 2a.

[3] A second count had charged Kolod, Alderisio and de Pietto with violating 18 U.S.C. § 875(b) in connection with a specific telephone conversation between Kolod and Sunshine on July 6, 1961. R. 8. Sunshine testified that Alderisio, accompanied by de Pietto, visited him in his Denver office, stated that Kolod had sent him to kill Sunshine, telephoned Kolod and put Sunshine on to speak to him. R. 56-59. Kolod testified that the call came from Sunshine directly. R. 315. In any event, the jury acquitted all three defendants on that count. App. A, *infra*, p. 2a.

telephone conversations between Kolod and Sunshine and a few between Alderman and Sunshine. The calls stopped only when Sunshine was indicted for an unrelated embezzlement in December 1962. App. A, *infra,* pp. 2a-3a, 5a-6a.

Sunshine testified that numerous threats had been uttered in those telephone conversations. R. 41, 47-49, 52-55, 69-72, 162-63. Kolod and Alderman denied it. R. 328, 350-51, 354, 359, 381, 446, 456, 467. The trial, as the Court of Appeals noted, was a "contest of credibility" on the issue whether threats were made in the conversations and the "thread of credibility" supporting the government's case was "tenuous." App. A, *infra,* pp. 6a, 8a. In three separate judicial proceedings, Sunshine had admittedly perjured himself concerning his transaction with Kolod. R. 104-10. He also admitted a long string of false statements in letters to Kolod and Alderman. R. 110-25.

The FBI Eavesdropping

Kolod testified that, for many of his conversations with Sunshine, including those in the last nine months of 1965, he had used the telephone in the executive conference room of his place of business, the Desert Inn, of which he was an owner and manager. R. 328; T. IV, 71. To corroborate his testimony that he had not threatened Sunshine, he made a proffer of proof that agents of the FBI had planted an eavesdropping device in the conference room, through which they had overheard every word he spoke and had never heard a single threat. The proffer was as follows (R. 412-18):

(1) On March 22, 1962, the FBI surreptitiously planted an electronic listening device in the conference room.

(2) The FBI had earlier leased twenty-five lines from the local telephone company. Through one of those leased lines it linked the listening device to its Las Vegas headquarters. The telephone company was instructed to bill the leased line first to "Henderson Novelty Company" and later to "Clarke Associates," both fictitious firms. Although both of those fictitious firms used the FBI's Las Vegas address, the telephone company was instructed to mail the bills to a post office box rented by "Fred Emery," a fictitious name used by an FBI agent. The bills were paid by government checks. This arrangement continued until August 1963 when a Desert Inn investigator discovered the listening device and the FBI ordered the leased line discontinued.

(3) Every word spoken by Kolod in the conference room from March 22, 1962, to the end of that year was conveyed over the leased line to FBI headquarters and there overheard by an FBI agent.

(4) Had there been threats, the FBI agents would have heard and recorded them.

(5) The agents neither heard nor recorded any threats.

In connection with its proffer, the defense requested production of the FBI's records of the eavesdropping. The trial court denied this request, but, instead, inspected the records *in camera* to determine whether they supported "the credibility of the defendants' testimony." App. A, *infra,* p. 8a. Finding no mention of any Kolod-Sunshine conversations in the eavesdropping records, the trial court concluded that Kolod had testified falsely when he claimed to have used the

conference room telephone (R. 516-17) and it rejected the proffer as a "fishing expedition", which would confuse and prejudice the jury with irrelevant evidence against the FBI. App. A, *infra,* p. 8a.

In their appeal the petitioners argued (1) that it was error to base the ruling on the proffer on FBI records never shown to the defense; (2) that the records, even if they showed no Kolod-Sunshine conversations, did not negate Kolod's testimony, because routine conversation, containing nothing of interest to the FBI, could be expected not to be mentioned in the records; and (3) that even if the FBI records tended to contradict Kolod's testimony, the credibility judgment was for the jury, not the court.

Although the government had assured the trial court that the documents originally submitted for *in camera* inspection constituted "the entire file relating to this matter" (R. 428-29), during the pendency of the appeal, it advised the Court of Appeals that it had discovered additional FBI records of the Desert Inn eavesdropping. The case was then remanded to the trial court for *in camera* inspection of the additional 700-odd pages of records and for a hearing to determine the subjective knowledge of the FBI agents about the Kolod-Sunshine conversations. App. A, *infra,* pp. 9a-10a. In the post-trial hearing, the records were again withheld from the defense and were again found devoid of any reference to Kolod conversations. App. A, *infra,* pp. 10a-11a. The government stipulated that there had in fact been an eavesdropping device in operation at the Desert Inn from March 22, 1962, to August 15, 1963. T. I, 13-14. From the testimony of the FBI agents, it is clear that Kolod was one of the tar-

gets of the eavesdropping.[4] The device was monitored by some twenty agents or employees in a room at the FBI's Las Vegas headquarters. T. II, 20-22. Through the leased telephone line, the device was connected to an amplifier in the FBI office and thence to a loudspeaker, a head-set and a tape recorder. The monitors could hear, either through the loudspeaker or the headset, all normal speech occurring in the Desert Inn executive conference room and, by flipping a switch, could record it. App. A, *infra*, p. 7a.

The FBI agents who testified at the post-trial hearing had no significant independent recollection of what they had heard; they based their testimony upon what appeared in the FBI records of the eavesdropping. T. II, 39; III, 16, 34, 87-89, 113-15, 131-33; IV, 24-25, 33, 37, 42, 52, 69. The records in question were of two types: (1) logs made by the monitors; and (2) summaries or transcripts of recorded conversations, made by a reviewing agent after playing back the tapes. The tapes themselves had been erased after review. App. A, *infra*, p. 7a.

It is clear from the testimony of the FBI agents that much of what the device picked up was not recorded, so that it could not have found its way into the summaries or transcripts. The Special Agent in

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[4] Special Agent Toolson, in an attempt to lend significance to the almost complete absence of Kolod's name from the bugging logs, testified, on the basis of his physical surveillance of Kolod, that Kolod was "a downstairs man" and "didn't go to the executive offices of the upstairs." T.IV, 60. One of the FBI's monitors, however, testified that Toolson gave the various monitors a list of "the principal people that would be close to the device" (T.IV, 28) and whose conversations, therefore, could be expected to be picked up. *That list contained Kolod's name.* T.III, 75-76.

Charge of the Las Vegas office and the agent in charge of the Desert Inn eavesdropping both testified that the monitors had been instructed to tape only what was significant and pertinent. T. II, 23, 25, 33-34, 50, 59-60, 62; IV, 63. Various monitoring agents testified that they had exercised discretion as to what to record. T. III, 12, 41, 46, 50-51, 80, 107. Moreover, much of what was recorded was omitted by the reviewing agent from the summaries or transcripts. T. II, 35, 49; III, 41-42; IV, 66. It is also clear, at least as to some of the monitors, that much of what the device picked up was never even logged. The Special Agent in Charge testified that the monitors had discretion as to whether to log seemingly insignificant material. T. II, 62-63. Another agent testified that each monitor would log "any activity which he found pertinent." T. III, 12. One of the monitors testified that he had monitored six devices simultaneously (T. III, 110) and that, if, while he was listening to one, something came over the other, he would simply record the second, without making any log entry other than the fact that he had switched on the recorder. T. III, 120-21. Another monitor, in the same situation, actively monitored one device and kept the recorders on for the other five, the only log entries as to each of those five being the time at which the recorder was switched on at the beginning of his shift and the time at which it was switched off at the end. T. IV, 34-35. How selective the logging was is indicated by the testimony of one monitor that he had logged only one conversation in four-and-a-half days of listening. T. III, 127-34. A further indication of the selectivity of the logging is that there were only about 700 pages of logs covering the operations of a busy executive office over a period of 510 days. App. A, *infra*, p. 10a.

The trial court, however, made a finding that, although not everything was recorded, everything was logged.[5] Using that finding as its first premise and, as its second premise, its *in camera* finding that the FBI records showed no Kolod conversations, the court concluded that Kolod had not used the conference room telephone for his conversations with Sunshine and that the proffer was, therefore, irrelevant. T.V, 13-14; S.R. IV, 4.

The Court of Appeals, affirming the rejection of the proffer, went beyond even the trial court's finding. It declared that everything was both logged and recorded.[6] Impressed by its erroneous view of the facts, the Court held that "Kolod's credibility would be negatived" by the proffered evidence, so that the proffer was irrelevant. App. A, *infra*, p. 11a. As to the conflict between Kolod's insistence that he had used the conference room telephone and the possible inference from the agents' testimony that he had not, the Court refused to allow a jury to resolve it. The Court said:

> "Such a nebulous conflict had no probative value in the trial issues and obviously would lead to a dramatic but immaterial diversion to a side issue if submitted to the jury." (*Ibid.*)

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[5] The trial court said:

"Whenever voices were heard over the amplifier, an entry was made in the log and usually the tape recorder was turned on to record the activity. . . ." S.R.IV, 2.

[6] The Court of Appeals said:

"Clerks in the office of the Bureau in Las Vegas would listen to loud speakers and record on log sheets any activity during the monitoring period. Whenever voices were heard an entry would be made on the log sheet and a tape recorder immediatly turned on." App. A, *infra*, p. 7a.

The Court of Appeals also affirmed the trial court's denial of all of the petitioners' requests for access to the FBI records upon which all the post-trial testimony was based.

At the post-trial hearing, counsel for petitioner Alderisio stated to the court that there was newly discovered evidence of a "wire tap or listening device" used against his client in Chicago between October 1, 1960, and December 31, 1962. The court sustained government objections to counsel's attempts to elicit from an FBI witness any information about this device. Counsel's contention that the government had a duty to come forward with such information was ignored by both the government and the court. T. IV, 98-100.

The Requested Instruction

Petitioners Kolod and Alderman both testified and both denied having threatened Sunshine. Since petitioner Alderisio did not testify, that part of Sunshine's testimony dealing with the face-to-face threats allegedly made by Alderisio during his visit to Sunshine's office in Denver on July 6, 1961,[7] stood undenied on the record. Petitioners were insistent, therefore, that the jury be properly instructed that the case involved interstate telephone transmission, not interstate travel.

As to Count Two, the court charged the jury that transmission "in interstate commerce by telephone" was an essential element of the offense. R. 498. The jury acquitted on that count. R. 12-13.

As to Count One, the trial court denied the petitioners' requested instruction that an essential element

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[7] *Supra* note 3.

of the offense was *scienter* that one or more threatening interstate telephone calls would be made. R. 505. The portion of the judge's charge to the jury dealing with Count One contained no other instruction that such *scienter* was essential. R. 495-98. In rejecting the petitioners' assertion of error in this connection, the Court of Appeals pointed to the instruction, located in the middle of that portion of the judge's charge dealing with Count Two, "that the transmission of a telephonic conversation by telephone wires from one state to another state constitutes transmission in interstate commerce of a communication within the meaning of the statute upon which the indictment in this case is based." R. 498; App. A, *infra,* pp. 17a-18a.

Petitioner Alderisio's Acquittal Motions

Petitioner Alderisio moved for judgment of acquittal at the conclusion of the government's case and again at the conclusion of the entire case. Both motions were denied. R. 282-83, 289-90, 484-85. Although the other petitioners presented evidence in defense, Alderisio did not. R. 476.

The Court of Appeals affirming Alderisio's conviction, treated both acquittal motions together and held that their denial was proper because, by "inferences from the record," he was connected to the federal element of the crime, "*i.e.,* the agreement to use interstate communication facilities for the unlawful purpose of making threats." App. A, *infra,* p. 19a. In reciting the "record" from which it drew its "inferences", the Court included the following facts: (1) that Alderisio had known the petitioners for ten years; (2) that he had been a guest at the Desert Inn several weeks before his visit to Sunshine; and (3) that, on

that occasion, he had received a Desert Inn check for $16,000 after Kolod had given the hotel teller that amount in cash. App. A, *infra*, p. 4a; see R. 508-09. These facts were not part of the government's case, but came into the record after Alderisio's first motion for acquittal was denied, in the course of his co-defendants' defense. R. 352-56. Alderisio's argument, on petition for rehearing (S.R.X, 9), that he was entitled to acquittal on the basis of the record as it stood at the conclusion of the government's case was ignored by the Court of Appeals. S.R.XI.

REASONS FOR GRANTING THE WRIT

1. This case confronts the Court with a new aspect of the problem of illegal[8] government eavesdropping. Hitherto convictions have been challenged because of the possibility that the prosecution may have derived some advantage from the illegal snooping. Here, the tables are turned. The victim agrees that the eavesdroppers heard nothing in any way helpful to the prosecution, but he asserts that what they heard—or failed to hear—would be helpful to the defense. Accused of having made threats, he sought to lay before the jury evidence that he had had uninvited "ear-witnesses" whose failure to remember any threats would corroborate his own denial of threats.[9] As the court below said, "If, in fact, the agents had listened

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[8] The illegality of the eavesdropping here, assumed throughout the proceedings below, is not open to question. The physical intrusion by which the listening device was installed suffices to make the whole operation illegal. *Silverman* v. *United States*, 365 U.S. 505, 510-12.

[9] Such "negative evidence" "may even sometimes be stronger than affirmative impressions." 2 Wigmore, *Evidence* § 664, at 778 (3d ed. 1940); and cases there cited.

to Kolod-Sunshine calls and recalled no threats, the testimony would clearly be probative and proper for jury consideration." App. A, *infra,* p. 10a. This conviction is challenged because both courts below permitted the government to suppress the evidence it had illegally obtained and to deprive the defense of its use.

Where the victim of the eavesdropping asserts that its fruits may have been used against him, the Court has held him entitled to full exploration at his trial of the extent to which the case against him may have been derived from the government's misconduct. Despite the Solicitor General's suggestions that post-trial hearings are a sufficient remedy in such cases, the Court's solution has been to vacate the convictions and remand for new trials. *Black* v. *United States,* 385 U.S. 26; *O'Brien* v. *United States,* No. 823, Oct. Term 1966, 35 U.S. L. Week 3329, March 21, 1967. Even the dissenting justice in *O'Brien,* although denying the necessity of a new trial, granted the necessity of a "full hearing." 35 U.S. L. Week at 3330.

In the trial of the case at bar, the government showed the trial judge what purported to be all of the FBI's records of the Desert Inn eavesdropping. He refused to allow defense counsel to examine those records, but, from his own perusal of them, found that they made no reference to the conversations in which Kolod had allegedly made the threats. Thus finding, and in utter disregard of uncontradicted evidence before the jury that the conversations in question had been from the "bugged" room, the judge concluded that they had not and that the proffered evidence was, therefore, irrelevant. The jury, of course, could have credited the evidence it had heard that Kolod had, in-

deed, spoken in the "bugged" room and, but for the exclusion of the proffered evidence, the jury could have accepted the defense argument that, had those conversations contained threats, the FBI records would have noted them.[10] By determining, as a basis for rejecting the proffer, that Kolod's unchallenged trial testimony was incredible, the trial court invaded the area reserved exclusively to the jury, *Wilson* v. *United States,* 162 U.S. 613, 621, and, in effect, directed, *pro tanto,* a judgment of conviction. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408.

Even assuming the court could properly usurp the jury's function, to make a finding on evidence not disclosed to the party affected ignores the most fundamental requirements of due process. *United States* v. *Abilene & Southern Railway Co.,* 265 U.S. 274, 286-90. This error taints the judgment below not only to the extent that it relied on the *in camera* inspection of the original FBI records and the second batch of records produced at the post-trial hearing, but also to the extent that it relied on the post-trial testimony of the FBI agents. That testimony was no more than a reflection of the contents of the records. In effect, the agents testified to what the records contained, for they had no independent recollection. When an agent said he had no knowledge that Kolod had used the telephone in the "bugged" room, all he was saying was that he could not find from the FBI records that Kolod had used that telephone. T.IV, 33, 51-52. Both the rulings of the trial court and the judgment of the Court of Appeals, therefore, rested on findings drawn,

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[10] In the post-trial hearing, one of the FBI agents testified that he would have recorded any threat he heard. T.III, 116.

in the final analysis, from material which was never in evidence and which the defense never saw.

The stubborn refusal to vouchsafe to defense counsel so much as a glance at the eavesdropping records upon which the courts below based their determinations mocks this Court's oft-expressed views on the Fourth Amendment and on federal discovery procedure. The government's illegal eavesdropping was directed against suspected criminal practices by the owners and operators of the Desert Inn, of whom petitioner Kolod was one. T.IV, 54-56, 71. Overheard were the private conversations held in the Inn's executive conference room. Since the spoken word, no less than papers and other property, comes within the ambit of the Fourth Amendment, *Wong Sun* v. *United States,* 371 U.S. 471, 485, petitioner Kolod, in the circumstances of this case, was entitled to recover from the government what it had unlawfully stolen from his premises. Even if the papers on which the government agents wrote down the purloined conversations are technically government property, effective implementation of the Fourth Amendment requires that they be surrendered to Kolod. But, whether or not he could have compelled surrender of the papers, he had an absolute right to take back, by inspection and copying, the words written on them.

Defense reliance on the liberal discovery policies exemplified in *Jencks* v. *United States,* 353 U.S. 657, and *Dennis* v. *United States,* 384 U.S. 855, was brushed aside below on the ground that the FBI agents, in testifying from the records in question, were not prosecution witnesses whom the defense needed to cross-examine, but rather defense witnesses. App. A, *infra,* p. 11a. According to the Court of Appeals, "*Jencks*

was designed to prevent a holding back of evidence relating to the prosecution's case. . . ." (*Ibid.*) The FBI agents were defense witnesses only in the technical sense that they would not have been in court had not the defense called them. To take so narrow and formalistic a view of the case and, on that account, to refuse to follow the spirit of *Jencks* and *Dennis* is to ignore the salient principle that neither courts nor prosecutors are permitted to frustrate the production of evidence which may tend to exculpate the accused. See *Brady* v. *Maryland,* 373 U.S. 83, 87-88; *Alcorta* v. *Texas,* 355 U.S. 28; *Gordon* v. *United States,* 344 U.S. 414, 419.

2. In *Black* v. *United States,* 385 U.S. 26, after denial of the petition for certiorari, 384 U.S. 927, the Solicitor General advised this Court voluntarily that the FBI had illegally eavesdropped on the petitioner's hotel suite in connection with an unrelated matter. The Court thereupon ordered the government to file a statement of the details of the eavesdropping activities. 384 U.S. 983. After the required statement had been filed, the Court vacated the conviction. 385 U.S. at 29. Those proceedings in *Black* exemplify the policy, both of the Court and the Solicitor General,[11] that the government, as a matter of course, make full disclosure to the victims of its illegal eavesdropping activities. That policy placed an obligation upon the government when petitioner Alderisio's counsel announced in open court

[11] In *Granello* v. *United States,* No. 750, Oct. Term 1966, 35 U.S.L. Week 3376, April 25, 1967, the Solicitor General declared that the petitioner would be furnished with the logs of illegal eavesdropping in business premises owned by an acquaintance of the petitioner in which the petitioner "may have had a proprietary interest."

that evidence had been newly discovered of "bugging" of Alderisio in Chicago, either to deny the "bugging" or to disclose the details. The government's failure to do either and the court's frustration of defense efforts to elicit the information from an FBI witness at the hearing require this Court's intercession.

3. The statutory base of the conspiracy count of which petitioners were convicted, 18 U.S.C. § 875(c), is part of that expanding [12] body of statute law whereby the federal government, under the commerce power, undertakes to police deviant behavior previously left to state and local jurisdiction. The gravamen of the offense under such statutes is and must be the federal element, "the intent of the defendant in regard to the interstate aspect of the offense." *Harms* v. *United States,* 272 F. 2d 478, 481 (4th Cir. 1959). Nor can the prosecution obviate the necessity of proving that key element by indicting, as here, under 18 U.S.C. § 371 for conspiracy to violate the statute, for such a conspiracy charge "cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'" *Ingram* v. *United States,* 360 U.S. 672, 677-78, quoting *Pereira* v. *United States,* 347 U.S. 1, 12. As was said in *Twitchell* v. *United States,* 313 F. 2d 425, 428 (9th Cir. 1963), "federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route." So, in various areas where federal jurisdiction has been created by introducing a federal element into an otherwise local crime, the courts have held that there can be no conviction without *scienter* of the federal element of the offense. See, for example, *Ingram* v. *United States,* 360 U.S.

[12] See, *inter alia,* 18 U.S.C. §§ 1084 and 1952.

672, 677 (federal gambling tax); *Carbo* v. *United States*, 314 F. 2d 718, 733 (9th Cir. 1963) (threats by interstate communications with intent to extort, the statute involved in Count Two in the instant case); *Lubin* v. *United States*, 313 F. 2d 419, 420 (9th Cir. 1963) (theft of federally protected bank property); *United States* v. *Bufalino*, 285 F. 2d 408, 416 (2d Cir. 1960) (perjury); *United States* v. *Moloney*, 200 F. 2d 344, 347 (7th Cir. 1952) (threats by mail); *United States* v. *Crimmins*, 123 F. 2d 271, 273-74 (2d Cir. 1941) (interstate transportation of stolen property).

Thus viewed, the failure to instruct the jury, as requested by petitioners, that *agreement to use interstate telephone communications* was an essential element of the offense invited the jury to expand federal criminal jurisdiction to purely local crime. The prosecution, in addition to evidence of threats by interstate telephone, had introduced evidence that petitioner Alderisio had threatened Sunshine in person on July 6, 1961, after *interstate travel* from Illinois to Colorado. Absence of an instruction on agreement to use the telephone permitted the jury to convict of conspiracy to threaten by interstate travel, something which may have been a state crime, but was not a federal crime.[18]

That portion of the instructions to the jury which the Court of Appeals found to be an adequate substitute for the requested instruction seems, from a reading of the instructions as a whole, to have been directed

[18] Interstate travel for the purpose of extortion did not become a federal crime until September 13, 1961, over two months after Alderisio's visit to Sunshine's office, with the adoption of 18 U.S.C. § 1952. This case was, of course, not brought under that statute.

toward Count Two of the indictment. Moreover, even if treated as applying to Count One as well, the language is patently insufficient to satisfy the law's requirement. The jury was instructed that "the transmission of a telephonic conversation by telephone wires from one state to another state constitutes transmission in interstate commerce. . . ." R. 498. But the jury was not instructed that transmission by telephone was the *only* form of transmission in interstate commerce on which they could base a conviction. Nothing prevented the jury from convicting all three petitioners on a theory that two of them had sent the third from one state to another to threaten Sunshine.[14]

4. When petitioner Alderisio moved for judgment of acquittal at the end of the government's case, the trial court marshalled the evidence of his involvement in the alleged conspiracy. It consisted solely of Sunshine's testimony about the July 6, 1961, visit to his office: that Alderisio had threatened him and told him that Kolod could call off the threat; that Alderisio, at Sunshine's suggestion (App. A, *infra*, p. 4a.), had then telephoned Kolod and put Sunshine on; and that Kolod had then called off the threat. There was nothing to show that Alderisio knew what Kolod had said to Sunshine.[15] R. 289-90. The motion was denied because this evidence was held to support a conspiracy "to

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[14] The Court of Appeals assumed that the petitioners had conceded that the language of the instruction was legally sufficient. App. A, *infra*, p. 18a. As shown by the petition for rehearing, however, the assumption was erroneous. S.R.X. 7-8.

[15] It was not the court's theory that a threat had been made in that telephone conversation, but rather that a threat had been lifted. R. 290. Moreover, the court later explained the jury's acquittal verdict on Count Two as a finding that the conversation had contained no threat. R. 509-10.

force Mr. Sunshine to pay over these funds out of fear of physical harm." R. 290. What the trial court ignored was that the charge was not conspiracy to threaten, but rather conspiracy to threaten by interstate telephone. There being no evidence of *scienter* on Alderisio's part of the federal element of the offense, namely, that threats were to be made by interstate telephone, he should have been acquitted. "Without the knowledge, the intent cannot exist." *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711.

The Court of Appeals, seeking to support the denial of the motion by "inferences from the record," committed error, conscious or unconscious, by including, as ground for its inferences, facts which were not in the record when the motion was made and denied. The error became conscious and intentional when it was brought to the attention of the Court of Appeals on petition for rehearing (S.R.X, 9) and that court failed to correct it. Assuming the continuing validity of the doctrine that a defendant, by presenting a defense, waives the erroneous denial of his motion for acquittal, such waiver can occur only where *"the defendant* introduces evidence in his own behalf after his motion for acquittal has been overruled." *United States* v. *Calderon,* 348 U.S. 160, 164. By basing its affirmance on evidence introduced not by Alderisio, but rather by his co-defendants in their own behalf, the Court of Appeals has given the waiver doctrine greater scope than it has ever had in any court. By contrast, the Court of Appeals for the District of Columbia, while not ruling on the validity of the waiver doctrine, strongly disapproved it and declared that, in any case, a defendant's motion is not waived by his co-defendant's testimony. *Cephus* v. *United States,* 324 F. 2d 893, 897 (D.C. Cir. 1963). Judge Wright, concurring, found "that archaic doctrine . . . without validity in any

case." 324 F. 2d at 898. A New Jersey court, half a century ago, rejected the waiver doctrine with the criticism that:

> ". . . by force of a ruling that was wrong when made, testimony that the defendant ought not to have been required to give at all may be laid hold of to sustain the wrongful ruling by which he was required to give it. This comes perilously near compelling the accused to convict himself. . . ."

State v. *Bacheller,* 89 N.J.L. 433, 436, 98 Atl. 829, 830 (N.J. Sup. Ct. 1916). It is submitted that the conflict between an approach which expands the waiver doctrine and one which abolishes, or at least narrowly confines it, going to the core of our accusatorial system of criminal justice,[16] is an appropriate subject for this Court's review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[16] See Comment, *The Motion For Acquittal: A Neglected Safeguard,* 70 Yale L.J. 1151 (1961).